IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

JAN EMIL DONATO, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	}	No. 17473.

APPELLANT'S OPENING BRIEF.

(1962 Appeal)

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JURISDICTION.

This is a second appeal.

In *Donato* v. *United States,* 9 Cir., 1962, 302 F.2d 468, this Court remanded the case to the district court and provided that in any "[e]vent a new final judgment should be rendered preserving rights to further appellate review."

On April 24, 1962, a new, final judgment was rendered [R. 13]. The Notice of Appeal from this judgment was filed in the time and manner required by law [R. 14].

STATEMENT OF THE CASE.

On April 24, 1962, the trial court certified to the Court of Appeals by a formal Certificate [R. 10] that it had considered the remand [T. 40].

On April 24, 1962, appellant was resentenced to three years imprisonment [R. 13, T. 49].

THE FACTS.

The facts upon which the decision of this Court were based appear in the briefing in the first appeal and in the reported opinion, all of which appellant desires to be considered on this appeal.

No new or additional testimony was presented by either party on the remand [T. 43].

QUESTIONS PRESENTED.

I.

Was there a legal basis for the conclusion of the trial judge at the remand hearing, April 24, 1962, to wit: that the defendant was not to be believed on the issue of defendant's avowed intention to perfect an administrative appeal?

II.

Is a selective service system administrative appeal essential, as an exhaustion of administrative remedies in a criminal case?

SPECIFICATIONS OF ERROR.

I.

The district court erred in concluding it had a basis in fact for finding appellant lied.

II.

The district court erred in not considering appellant's defenses on their merits.

SUMMARY OF ARGUMENT.

I.

A trier of fact must have a factual basis for disbelieving a witness: evidence or demeanor must exist.

No valid basis was used by the district court to reach its conclusion that appellant lied.

II.

The trial court never considered the merits of appellant's defenses. The trial court applied the rule of exhaustion of administrative remedies. Application of this rule to a criminal case, under the circumstances present is error.

III.

The record, briefs and reported opinion in the prior appeal (*Donato* v. *United States,* 9 Cir., 1962, 302 F.2d 468) should be considered as part of the record and the briefing in the determination of this appeal.

ARGUMENT.

I.

There Was No Basis for Concluding Appellant Had Lied.

Donato testified he intended to perfect an administrative appeal and that his fire fighting call came and frustrated him. A majority of the court held his account, if true, sufficient to justify a relaxing of the rule on exhaustion of administrative remedies. On remand no further facts were adduced. The trial court, on the remand held his account untrue.

We first point to the following elements in the posture of the case:

a. No serious attempt was made, by the prosecution or by the trial judge to shake appellant's testimony on this subject;

b. The facts concerning the times and extent of the forest fires he mentioned, and the fact of his claimed presence at them were all matters readily checked yet neither at the trial, nor at the remand hearing a year later was any evidence on the subject introduced by the government or any further questions asked of Donato.

The above elements in the factual situation lead us to ask just what did the trial court disbelieve? Was it—

1. That Donato was fighting fires at the times and places he named?

2. The length of the firefighting activity?

3. Or was it solely the subjective matter, namely, Donato's expressed intention to appeal?

Because of the elements enumerated above (a. and b.) it must have been the last possibility (no. 3) and we shall make our argument on that assumption.

We argue that Donato's failure to appeal was neither deliberate nor intentional. If it was, then he comes within the proscription of the Evans and Prohoroff* cases that this Court used as points of reference in its decision on the first appeal. Although the trial court concludes its Certificate with the statement "It is clear that the defendant's failure to appeal administratively was deliberate and intentional" [R. 12, T. 43] we contend it is not clear at all and that there is no basis in the record for the trial judge's belief as expressed in the Certificate.

There were two kinds of evidence before the trial judge, direct and indirect:

The direct evidence was that Donato was getting ready to appeal [R. 29, 32-33].

The fact that he didn't do it would ordinarily be against him [with respect to exhaustion of remedies] but here it is immaterial and of no weight, that is, concerning intent.

The indirect evidence was drawn out by the trial judge, over objection [T. 31] the court stating "It bears on the question of intent." This shows that the court was looking for evidence that would bear on this question. It is our view the trial court realized there had to be some evidence to support an adverse conclusion.

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*_Evans_ v. _United States_, 9 Cir., 1958, 252 F.2d 509; _Prohoroff_ v. _United States_, 9 Cir., 1958, 259 F.2d 694.

Thus, the only evidence to support the trial court's conclusion that Donato lied is that he didn't appeal the first time he had a chance and such evidence being immaterial it affords no basis for the trial court's conclusion.

The matter is now before the Court as if it were submitted on an agreed statement of fact. This Court has already held it may review such a factual matter. *Blair et al.* v. *United States,* 9 Cir., 1917, 241 Fed. 217:

> "It is well settled that, when a case is submitted upon an agreed statement of facts, the sufficiency of the facts so agreed on to sustain the judgment entered may be reviewed on writ of error. United States v. Eliason, 16 Pet. 291, 300, 10 L. Ed. 968; Henderson's Distilled Spirits, 14 Wall. 44, 53, 20 L. Ed. 815; Hipple v. Bates County, 223 Fed. 22, 138 C.C.A. 436. See also Kennedy v. Brent, 6 Cranch 187, 3 L. Ed. 194; Barnet v. Chapman, 5 Cranch 358, 3 L. Ed. 125." [230]

If this were a civil case the test of substantiality would be used. This Court so held in *United States* v. *Jones,* 9 Cir., 1935, 74 F.2d 986. We argue that a more stringent test should be used in a criminal appeal.

In any event as a matter of law there must be some evidence to support a finding. For example: In passing on judgment of non-suit, this Court held it was required to determine if there was evidence of sufficient *substantiality* to support a verdict for plaintiff, and, if not, plaintiff was properly non-suited. *Wood* v. *Moore,* 9 Cir., 1928, 97 F.2d 402, 407. This principle should be even more applicable in a criminal case.

As the dissenting opinion of this Court in the first appeal pointed out the case was remanded to the trial court

for possible further probing into Donato's excuse for not appealing. It is now reasonably clear that the trial court believed no more facts could be adduced by additional probing. Our view is that this is a concession that all objective matters testified to by Donato would only be corroborated by additional probing and that there remained for the trial court only an assessment of the subjective matters relating to intent. We repeat our view that in a criminal case there can be no adverse finding on such a subjective matter absent a scintilla of probative evidence.

II.

An Administrative Appeal by a Selective Service Registrant Is Not an Essential Prerequisite, in a Criminal Case for a Consideration of His Meritorious Defenses.

We concede that many courts have assumed the contrary and so held. We argue that the Supreme Court has never so declared and that it isn't good law.

The doctrine was started to protect the courts from having to deal with complex factual situations better decided by expert agencies. Its extension to criminal cases was a long and wrong step and, as a Third Circuit dissenting opinion has pointed out "The courts of appeal and district courts have been divided as to whether exhaustion of all administrative remedies must be shown in these Selective Service cases." *Palmer* v. *United States,* 3 Cir., 1955, 223 F.2d 893, 901 (minority opinion of three judges out of an *en banc* hearing by seven).

Therefore, we will consider and argue only the Supreme Court decisions. Although there have been very

many civil cases before the Supreme Court that involve this doctrine (see Appellant's Reply Brief in first appeal) there have been only four draft cases that refer to this doctrine:

Billings v. *Truesdell,* 1944, 321 U.S. 542, 64 S. Ct. 737, *Falbo* v. *United States,* 1944, 320 U.S. 549, *Estep* v. *United States* (*Smith* v. *Same*), 1946, 327 U.S. 114, 66 S. Ct. 423, *Gibson* v. *United States* (*Dodez* v. *Same*), 1946, 67 S. Ct. 301.

1. Billings was a habeas corpus case and therefore does not really apply to our contention that the doctrine should not be used in criminal cases. In addition, in Billings the issue was not the rule of exhaustion of remedies. A registrant was denied a classification as a conscientious objector. He reported to the army when directed to, but refused to submit to induction. The army claimed Billings was subject to military jurisdiction. The Court held he was not. In explaining that Billings had tried to complete the selective service process as outlined in the Falbo case, the Court for the first time referred to "exhaustion". The Court definitely did not extensively consider the rule; it did not lay down a mandatory rule; it merely said:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the Falbo case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the Falbo case * * *" (321 U.S. at 558).

2. Falbo only holds that the last step (obeying the order to report) is essential to qualify for judicial review. This is explicitly recognized in *Donato* v. *United States*, 9 Cir., 1962, 302 F.2d 468. The logic of this is clear: The registrant must go the end of the ladder but need not step on every rung. The available administrative appeal is but an intermediate "rung" and is otherwise concededly *optional.* No one would contend, for example, that failure to take such an appeal is ever a violation of law, whereas a failure to report for induction is and has been the sole basis for indictment and prosecution in several thousand instances.*

In Falbo, petitioner urged that the District Court had erred in refusing to permit a trial *de novo* on the merits of his claimed exemption. The board had classified one of Jehovah's witnesses as a conscientious objector rather than a minister. Since, at that time, the order to report to a Civilian Public Service Camp was not the final step in classification (he was later physically examined and might be rejected and placed in Class IV-F), the Court viewed the order to report as "an intermediate step" and not reviewable (as intermediate orders are usually not reviewable.) The Court did not even refer to "exhaustion". It framed the issue and its ruling thus:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a

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*Federal Prisons, 1946 (Annual report of the Bureau of Prisons) 11 Conscientious objectors (1950) 318-328 (Published by SS System).

criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process.

"We think it has not." (320 U.S. at 554.)

3. Again in the Estep case (1946), the Supreme Court did not decide that a person must exhaust administrative remedies. The real issue was whether Selective Service classifications could be reviewed in criminal prosecutions.

The Court unanimously held that such review was constitutionally required, saying:

"Judicial review may indeed be required by the Constitution, Ng Fung Ho v. White, 259 U.S. 276 * * * It is only orders 'within their respective jurisdictions' that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under sec. 11 * * *.

"Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction does not stand on a different footing * * * If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service because he was a Jew, or a German, or a Negro, it would act in defiance of the law. If a local board refused to reopen on the written request of the State Director a registrant's classification and refused to cancel its order to report for induction, it would be acting in the teeth of the regulations. In all such cases its action would be lawless and beyond its jurisdiction.

> "* * * We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency * * * The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

The Jehovah's witnesses in the Estep case did not have any religious scruples against cooperating with Selective Service; the Selective Service process had been carried out completely and they had been accepted for service. It is clear that it was this final acceptability for service that was important, though the Court does incidentally refer to "exhaustion"—not as a mandatory requirement, but as having been completed. Said the Court:

> "In Falbo v. United States * * * We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under sec. 11 where he reported for induction, was finally accepted, but refused to submit to induction" (327 U.S. at 115-116).

> "Falbo v. United States, supra, does not preclude such a defense in the present case (classification without basis in fact). In the Falbo case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these

registrants had pursued their administrative remedies to the end" (327 U.S. at 123).

If being "finally accepted" is the important criterion (so that the administrative classification may have become final) then the change in the law and regulations place the defendant in the instant case in the same position as Estep and able to question his classification. At the time of the cases discussed above a notice to appear for induction came first and then a physical examination. Now the physical examination comes first and a person who is delinquent in taking the examination or otherwise can be ordered to report for induction and is accepted without a physical examination (32 C.F.R. Sec. 1628.10). Conscientious objectors ordered to a job do not have to take a physical examination at the job.

4. Gibson (and Dodez) present a "further step" (as the Court termed it on page 302) in the development of the law on this point. Gibson was prosecuted for leaving a Civilian Public Service Camp (the then form of civilian work in lieu of induction) five days after his arrival. Dodez refused to go to a C.P.S. Camp.

The Court stated—

> "The principal issues relate to the time of completing the administrative selective process and the effect in each case of what was done in this respect upon the petitioner's right to make defense in the criminal proceedings on various grounds going to the validity of the classification." [302]

The government argued that Gibson had gone too far and thus his defenses were cut off; that Dodez hadn't

gone far enough and was in the same defenseless position as Falbo. All the lower courts agreed with the government; the Supreme Court did not, in both cases.

The decision turned on the change of regulations after Falbo; the advent of the preinduction physical examination.

The Supreme Court has never spoken on the intermediate portions of the procedures. It seems clear that they are optional, that (as we have already said) they are like rungs of a ladder and that arriving at the *end* of the ladder is the essential step to "complete the Selective process." This Donato did.

The primary question presented is whether the rule of exhaustion of remedies should be applied so as to exclude an otherwise meritorious defense against a criminal charge. As the dissent in the first appeal of this case pointed out the non-application of the rule would not free the defendant; and the only burden imposed on the trial courts would be that of hearing the defense.

If the rule should be applied in criminal cases the next question is how harshly it should be applied. Should it ever be applied where the sentence, as here, can be a prison term whose length approximates that of the entire adult life of the defendant?

If the rule is applicable to cases where the possible loss to the defendant is so great compared with the effort required of the court, is the rule applicable where defendant may have been unaware of the grave consequences of his lack of action?

It has been held by this Court, that even if the answers to the above questions are affirmative, still the rule is not applicable unless the omission was "deliberate". Does this mean that deliberate intent must be shown? *i. e.*, must the record show that defendant deliberately refused to act? We believe it must; we point out that no such evidence was presented or even referred to.

If application of the rule does not require demonstration of deliberate ill intent, doesn't this mean that the burden has been shifted to the defendant of proving his innocence? If this remarkable conclusion were correct, exhaustion of administrative remedies would emerge as a potent weapon for those who would shortcut the entire system of evidentiary rules laboriously erected through ten centuries of Anglo-Saxon law.

CONCLUSION.

Even if the rule is applicable in the face of these weighty objections, appellant remains in the right, since he did present evidence (his direct testimony) that he had good intent, although frustrated into inaction by an excess of obligations. Must there not be other controverting evidence if the defendant is not believed?

If there need not be other evidence, can the court then disbelieve the witness as to his own state of mind, one showing some defect in the character of the witness? Can the court simultaneously conclude that the defendant is an otherwise honest man while insisting on disbelief of a single, isolated statement?

If there need be other evidence, at least relating to the defendant's character, is his failure to act on another occasion any more material to the question of intent than his failure to act on this occasion? [We point out that if intent is the central question, establishment of the deed (failure to appeal) cannot be conclusive of the question, otherwise there would be no question] Even if ill intent had been proved on a previous occasion (which it was not, but only lack of good intent) it could hardly prove ill intent on the present occasion without the assumption of a natural tendency to evil. If one believes in the inherent goodness of man and his ability to learn, the demonstration of a previous mistake would argue for rather than against the defendant having learned by his experience (as he said he did.)

Appellant does not argue here that the trial court be directed to take a particular view of human nature. Rather, we wish to show that where the rule of exhaustion of administrative remedies is applied as it was in this case, a particular view of human nature is allowed to form the entire basis for a decision at law.

In other words, the ruling of the trial court is seen to consist of the following: an otherwise meritorious defense against a criminal charge brought against an inexperienced young man can be ignored because of a procedural omission by him at a time when he was without counsel, where the omission occurred not only without evidence of ill intent but where evidence of good intent is disbelieved solely on the basis of testimony regarding some other and quite dis-

tinct act, in itself not casting any doubt on the character of the witness.

Respectfully,

J. B. Tietz,
Attorney for Appellant.

September 15, 1962.